84-1117

No.

Office-Supreme Court, U.S.
FILED
JAN 2 1985
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

PHILLIP KAIN, d/b/a BROCK-KAIN,
Plaintiff-Respondent,

vs.

WINSLOW MANUFACTURING, INC.
and WATSCO, INC.,
Defendants-Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

GERRIT H. WORMHOUDT
(Counsel of Record)
THOMAS D. KITCH
JOHN E. COWLES
Suite 1600, 125 N. Market
P.O. Box 997
Wichita, Kansas 67201
316-267-7361
Attorneys for Petitioners

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTION PRESENTED

Whether, upon a motion for judgment notwithstanding the verdict under Fed. R. Civ. P. 50(b) the trial court has the authority to reopen the judgment and order a new trial.

TABLE OF CONTENTS

QUESTION PRESENTED 1
OPINION DELIVERED IN THE COURT BELOW 1
JURISDICTION 2
FEDERAL RULE OF CIVIL PROCEDURE INVOLVED IN THIS CASE 2
STATEMENT OF THE CASE 3
REASONS FOR GRANTING THE WRIT 5

I. This Court Should Settle the Long Standing Conflict Among the Federal Courts, the Federal Rules Advisory Committee, and Commentators Concerning a Trial Court's Power Under Rule 50(b) to Grant a New Trial 5

II. The Decision of the Tenth Circuit Directly Conflicts With the Decisions of This Court Which Value Substantial Justice Above Inappropriate Consequences of Narrow Interpretation of Procedural Rules 15

CONCLUSION 19

APPENDIX

A. Opinion of the Court of Appeals A1
B. Unpublished Opinion of the Trial Court A7

TABLE OF AUTHORITIES

Cases

Cone v. West Virginia Pulp and Paper Co., 330 U.S. 212 (1947) 9
Daniels v. Chaffee, 230 Kan. 32, 630 P.2d 1090 (1981) 19
Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215 (1962) 16, 17, 18
Jackson v. Wilson Trucking Corp., 243 F.2d 212 (D.C. Cir. 1957) 6, 7, 10, 11, 12, 13, 15
Kain v. Winslow Mfg., 736 F.2d 606 (10th Cir. 1984) 1
Kanaster v. Chrysler Corp., 199 F.2d 610 (10th Cir. 1952), *cert. denied*, 344 U.S. 921 (1953) 15
Marshall's U.S. Auto Supply v. Cashman, 111 F.2d 140 (10th Cir.), *cert. denied*, 311 U.S. 667 (1940) 15
National Farmers Union v. Wood, 207 F.2d 659 (10th Cir. 1953) 15
Thompson v. Immigration Service, 375 U.S. 384 (1964) 17, 18
Wolfsohn v. Hanklin, 376 U.S. 203 (1964) 18

Statutes

15 U.S.C. §1 3
28 U.S.C. §1254(1) 2
28 U.S.C. §1331 3
28 U.S.C. §2101(c) 2

Federal Rules

Fed. R. Civ. P. 1 12
Fed. R. Civ. P. 6 16
Fed. R. Civ. P. 50(b) ..... *passim*
Fed. R. Civ. P. 50(d) 16, 19
Fed. R. Civ. P. 59(d) 15
Fed. R. Civ. P. 60(b)(6) 13

Other Authorities

5A J. Moore, *Moore's Federal Practice* ¶50.01 (2d ed. 1982) 7
5A J. Moore, *Moore's Federal Practice*, ¶50.11 (2d ed. 1982) 6
71 Harv. L. Rev. 552 (1958) 6
33 Notre Dame Law. 126 (1957) 6
5 UCLA L. Rev. 154 (1957) 6
25 Va. L. Rev. 261 (1939) 7
1946 *United States Code Congressional Service*, 79th Cong., 2d Sess. 8

No.

In the Supreme Court of the United States

OCTOBER TERM, 1984

PHILLIP KAIN, d/b/a BROCK-KAIN,
Plaintiff-Respondent,

vs.

WINSLOW MANUFACTURING, INC.
and WATSCO, INC.,
Defendants-Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioners, Winslow Manufacturing, Inc. and Watsco, Inc., respectfully pray for a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit entered herein on May 31, 1984.

OPINION DELIVERED IN THE COURT BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported as *Kain v. Winslow Mfg.*, 736 F.2d 606 (10th Cir. 1984), a copy of which is attached hereto as Appendix A. An unpublished opinion delivered by the trial court, filed November 13, 1981, appears in Appendix B.

JURISDICTION

Petitioners seek review of the decision of the Tenth Circuit Court of Appeals filed May 31 1984. The Tenth Circuit denied a timely petition for rehearing and suggestion for rehearing en banc on October 4, 1984. This petition for certiorari was filed within ninety days following the denial of rehearing. 28 U.S.C. §2101(c). Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED IN THIS CASE

Fed R. Civ. P. 50(b):

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. *If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new*

trial or direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

(emphasis added).

STATEMENT OF THE CASE

Respondent Kain filed suit in the United States District Court for the District of Kansas against Peel's Friendly Supply Company ("Peel's") and against petitioners Watsco, Inc. and its subsidiary Winslow Manufacturing, Inc. ("Winslow"). Kain alleged violations of the Sherman Anti-Trust Act (15 U.S.C. §1, et seq.), as well as claims for unfair competition and breach of contract. Federal question jurisdiction was invoked pursuant to 28 U.S.C. §1331.

Kain is a wholesale distributor of hair spray and shampoo supplies to hair salons in Kansas. Defendant Peel's is a wholesale distributor of a similar line of products. Defendant Winslow is a Florida corporation engaged in the manufacture of hair spray and shampoo products. Winslow is a wholly owned subsidiary of Watsco.

The action proceeded to trial, but before the case was submitted to the jury, the trial court dismissed the contract claim and plaintiff withdrew the claim under the Robinson-Patman Act. On October 7, 1980, the jury returned a verdict against plaintiff Kain on his Sherman Act claim, but found that Peel's had engaged in unfair competition, and that Winslow had "knowingly assisted" Peel's. The jury awarded actual damages of $144,744.00 and punitive damages of $250,000 against all defendants.

The defendants filed timely post-trial motions. Defendants Winslow and Watsco moved for judgment not-

withstanding the verdict under Fed. R. Civ. P. 50(b) based on the ground, among others, that there was no evidence to support the jury's verdict that Winslow had knowingly assisted Peel's in its acts of unfair competition with Kain. Defendants Winslow and Watsco did not move for a new trial under Rule 59(d).

On November 13, 1981, the trial court filed its "Memorandum and Order Relative to Defendants' Post-Trial Motions," a copy of which is attached hereto as Appendix "B." The court ordered a remittitur as to Peel's. Peel's thereafter entered into a settlement with Kain and is no longer active in this case. The court granted Winslow and Watsco a new trial. In so doing, it made an affirmative finding that petitioner had *not* knowingly assisted Peel's misconduct:

> It was admitted that Winslow could totally revoke plaintiff's franchise for any or no reason. Plaintiff showed no reason why Winslow would engage in some type of complicated scheme to drive plaintiff out of business when it could simply revoke the franchise. The evidence shows that Winslow gave Peel's a franchise in the hopes of increasing business and that *Winslow and Watsco did not knowingly assist Peel's in practicing unfair competition against plaintiff.*

Memorandum and Order of November 13, 1981, p. 5 (emphasis added).

Both plaintiff and these defendants accepted the trial court's order granting a new trial which was limited to the issue of whether Winslow had knowingly assisted Peel's unfair competition with Kain. A second trial commenced in February of 1982. The second jury deliberated

for less than one hour before returning a verdict in favor of petitioners.

On March 3, 1984, respondent Kain filed a Notice of Appeal to the Tenth Circuit Court of Appeals. Respondent's Notice of Appeal and docketing statement made no challenge to the trial court's authority to grant a new trial under Rule 50(b). This question was first raised in respondent's brief on the merits as "an additional issue" for the appellate court's consideration.

Thereafter, the Tenth Circuit held that the trial court did not have discretion to order a new trial under Rule 50(b), and the judgment against Winslow and Watsco following the first trial was reinstated.

The sole question before this court is whether the trial court had the discretion to order a new trial as a form of lesser relief upon the motion for J.N.O.V. properly and timely filed by Winslow and Watsco.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD SETTLE THE LONG STANDING CONFLICT AMONG THE FEDERAL COURTS, THE FEDERAL RULES ADVISORY COMMITTEE, AND COMMENTATORS CONCERNING A TRIAL COURT'S POWER UNDER RULE 50(b) TO GRANT A NEW TRIAL.

The decision in the court of appeals below represents an alarming turn of events in the continuing controversy over the interpretation of a trial court's authority under Rule 50(b) to exercise discretion to grant a new trial upon a motion for judgment notwithstanding the verdict. This controversy sprang to life in a 1957 decision by a split panel

of the United States Court of Appeals for the District of Columbia. In *Jackson v. Wilson Trucking Corp.*, 243 F.2d 212 (D.C. Cir. 1957), it was held that a tacit prerequisite exists with respect to a trial court's discretion to grant a new trial under Rule 50(b): judgment notwithstanding the verdict must be "warranted" before the court is deemed to have the authority to deny that relief and grant the lesser remedy of new trial. *Id.* at 214.

The Tenth Circuit, persuaded that the trial court's discretion to grant a new trial was conditional as theorized in *Jackson*, has ignored the plain language of Rule 50(b), has disregarded the criticism that has accompanied the *Jackson* decision,[1] and has extended its rationale to the point that trial courts must now engage in the artificial and self-contradictory ritual of declaring that J.N.O.V. is "warranted" before being able to exercise the authority which it already possessed under Rule 50(b) to grant a new trial.

Petitioner seeks a writ of certiorari for the purpose of rectifying the patent injustice in this case and, more importantly, settling the conflict engendered by *Jackson* and exacerbated in the court below. By resolving the controversy that has arisen with regard to its own Rule, this Court will enable litigants and trial courts to rely on the plain meaning of Rule 50(b), without exposing them to the unexpressed and unjustifiable risk that the results of the second trial will be set aside if the trial court did not first declare that J.N.O.V. was warranted.

---

1. The *Jackson* decision received immediate and unanimous criticism from several commentators. *See, e.g.*, 5A J. Moore, *Moore's Federal Practice*, ¶50.11 (2d ed. 1982); 71 Harv. L. Rev. 552 (1958); 33 Notre Dame Law. 126 (1957); 5 UCLA L. Rev. 154 (1957). The common theme of these authorities is that the *Jackson* decision unjustifiably restricts the discretion of the trial court to grant a new trial.

Indeed, the decision of the Tenth Circuit demonstrates the fallacy inherent in *Jackson*: by requiring a trial court to state that J.N.O.V. is warranted, the court below is removing the very element of discretion vouchsafed to trial courts by Rule 50(b). For how can such an order survive complaint by the moving party that failure to grant J.N.O.V. was itself an abuse of discretion?

The History of Rule 50(b)

Rule 50(b) was drafted and included in the Federal Rules of Civil Procedure in 1937. *See generally* 5A J. Moore, *Moore's Federal Practice* ¶50.01 (2d ed. 1982). One of the drafters of the rule explained that the new rule provided that a motion for J.N.O.V. placed discretion with the trial court to direct judgment or order a new trial.

> Thus, when a party has moved for a directed verdict and his motion has been denied or not granted (within 10 days after the verdict, or, if no verdict has been returned, within 10 days after the discharge of the jury), he may now move to have the verdict and judgment (when any) set aside and the judgment entered according to his motion, or a similar motion may be made if no verdict was returned. The court may now, on such motion, either direct the entry of the judgment as asked, or may grant a new trial.

Judge Armistead Dobie, *The Federal Rules of Civil Procedure*, 25 Va. L. Rev. 261, 289 (1939) (also quoted in the *Jackson* dissent, 243 F.2d at 218).

In 1946, the Federal Rules Advisory Committee considered proposed amendments to Rule 50(b). Among the suggested amendments was additional language that would expressly allow the party in opposition to a motion for J.N.O.V. to submit a conditional motion for new trial

should J.N.O.V. be granted by the trial court or on appeal. That proposal was rejected, however, because the Advisory Committee recognized that the plain language of the rule *already* contained the alternative remedy of a new trial which could be granted at the discretion of the trial court.

> A trial court or an appellate court in setting aside a verdict always has discretion, if justice requires it, to order a new trial, instead of directing the entry of judgment. Rule 50(b) states that the court on a motion for judgment notwithstanding the verdict 'may either order a new trial or direct the entry of judgment' for the moving party.

Advisory Committee Note, 1946 *United States Code Congressional Service*, 79th Cong., 2d Sess., p. 2352.

In 1947, Justice Black cited these comments from the Advisory Committee when he wrote in strong support of the trial court's discretion to grant a new trial under Rule 50(b) and explained the rationale for providing such discretion.

> The rule provides that the trial court "may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed." *This "either-or" language means what it seems to mean, namely, that there are circumstances which might lead the trial court to believe that a new trial rather than a final termination of the trial stage of the controversy would better serve the ends of justice.* In short, the rule does not compel a trial judge to enter a judgment notwithstanding the verdict instead of ordering a new trial; it permits him to exercise a discretion to choose between the two alternatives. *See Berry v. United States, supra* (312 U.S. 452, 453, 85 L. ed. 946, 947, 61 S. Ct. 337). And he can see

> [sic] exercise this discretion with a fresh personal knowledge of the issues involved, the kind of evidence given, and the impression made by witnesses. His appraisal of the bona fides of the claims asserted by the litigants is of great value in reaching a conclusion as to whether a new trial should be granted. Determination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart.

Cone v. West Virginia Pulp and Paper Co., 330 U.S. 212, 215-216 (1947) (footnote omitted) (emphasis added).

The fundamental purpose of a motion for judgment notwithstanding the verdict is to allow the trial court to review the entire record of the proceedings to determine whether the jury has afforded justice to the litigants. Where, as in this case, the motion is based upon insufficiency of the plaintiffs' evidence, the trial court examines all of the evidence to test whether the verdict is supported. In reviewing trial proceedings to determine whether a motion for J.N.O.V. should be sustained, the reviewing judge invariably is informed as to the state of the record in the light of the lesser standard governing the granting of new trials. Accordingly, under Rule 50(b) the remedies from which the trial court may choose are not limited to the polar extremes of (1) allowing the verdict to stand or (2) entering judgment in favor of the movant. To relieve the harshness of choosing between these extremes, the rule provides that the court may, in its discretion, reopen the judgment and order a new trial for the parties.

The drafters of Rule 50(b) and subsequent members of the Advisory Committee have consistently expressed

their intent that the rule gives broad discretion to the trial court to choose the appropriate relief upon a motion for J.N.O.V. Where, in the interest of justice, a new trial should be granted in lieu of the ultimate relief of directing judgment, the trial court has unfettered authority to grant such a remedy.

The Tenth Circuit, however, has imposed an artificial restriction upon the authority of a trial court to exercise its discretion under Rule 50(b). The Tenth Circuit has held that the discretion to order a new trial does not exist unless the trial court *expressly rules* that J.N.O.V. is "warranted," although denied in favor of granting a new trial. 736 F.2d at 609. This condition is not found in the rule itself and actually represents an even more extreme position than that adopted in *Jackson v. Wilson Trucking Corp., supra.* Making complete the triumph of form over substance, the court below refused to review the actual state of the record to determine whether or not J.N.O.V. was in fact warranted. To this extent, it even departed from the much-criticized holding in *Jackson*, hereafter detailed, that at least focuses upon the *actual* state of the record to determine whether J.N.O.V. is "warranted."

The Jackson Decision

The *Jackson* majority recognized the authority of a trial court to order a new trial upon a motion for J.N.O.V. under Rule 50(b). Judge Fahy, writing for the majority, conditioned such authority, however, upon the trial court's supportable conclusion that J.N.O.V. was "warranted."

> When a trial court concludes that a proper basis exists for granting a timely, well-grounded motion for judgment n.o.v., it has a discretion to grant the lesser relief and to order a new trial instead if justice

> would thereby better be served. This is so even though no motion for a new trial has been filed, and even though 10 days have elapsed since the entry of judgment. This discretion to grant the lesser relief, however, comes into being *only when the record is such that the entry of judgment n.o.v. would be warranted.*

243 F.2d at 214 (footnote omitted) (emphasis added).

This illogical and self-contradictory approach drew a forceful rebuke in a lengthy dissent by Circuit Judge (now Chief Justice) Warren Burger.

> I agree that the trial judge can grant a new trial in response to a timely motion for judgment n.o.v. where the record warrants the entry of a directed verdict, but I find no reason for limiting or conditioning the court's discretion to cases where judgment n.o.v. could have been granted. It is the actual motion for judgment n.o.v., not the state of the record, which invokes the trial court's discretionary power to grant a new trial whether before or after ten days have elapsed from date of judgment. In exercising this discretion, the court's choice of remedies must, of course, be governed by the evidence, but there is no sound reason why it should be artificially limited as the majority holds.

243 F.2d at 217.

Judge Burger's rationale is consistent with both the legislative history of Rule 50(b) and the plain meaning of the wording of the rule. In fact, if any exception to the letter of the rule should be created, it is that where J.N.O.V. is "warranted" by the complete lack of evidence in support of plaintiff's claim the trial court ordinarily

must enter J.N.O.V. In such circumstances, the trial court's broad discretion under Rule 50(b) would be narrowed because of the absence of any evidence that would justify a new trial. The *Jackson* decision stands the rule on its head by assuming that no discretion exists under the rule until the highest relief is "warranted." This is an ill-conceived, judicially constructed amendment to the clear language of Rule 50(b).

In his dissent, Judge Burger reviewed the history of Rule 50(b) and discussed the rationale for upholding the trial court's authority to choose the appropriate remedy upon a motion for J.N.O.V.

> It is the trial court in our judicial system which is the primary tribunal to dispense "justice" and it is the appellate function which is limited and narrow. A reversal of the district judge's action in this case frustrates that primary and broad authority. In my opinion it also does not give full effect to the spirit of the Federal Rules and their emphasis upon substance rather than form in the administration of justice.

Id. at 222.

The *Jackson* decision is a clear aberration from the plain meaning of Rule 50(b), and directly contradicts the ultimate command of the Federal Rules of Civil Procedure, to wit: "They shall be construed to secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1.

The court below extended the *Jackson* decision without discussing the legislative history of Rule 50(b) or employing the canon of construction specified in Rule 1. By accepting the narrow and harsh interpretation of the

Jackson decision, the court below committed a double injustice. First, the Tenth Circuit adopted (and perpetuated) an erroneous construction of Rule 50(b), which infringes upon the discretion that a trial court must have in order to select a proper remedy upon a motion for J.N.O.V.

Second, the decision below elevates the form taken by the trial court's ruling (i.e., that J.N.O.V. was not "warranted") to a position which is superior to the actual findings made by the trial court in support of its decision to grant a new trial. Thus, in *Jackson,* the trial court expressly ruled that: "I do not think the state of the evidence is such that I can properly grant the motion [of defendants] for judgment notwithstanding the verdict." Quoted in *Jackson,* 243 F.2d at 214. The trial court's commentary on the evidence in this case is diametrically opposed to that of the trial judge in *Jackson*: there is no suggestion that the state of the record precluded the entry of J.N.O.V. *See* Order of November 13, 1981, Appendix B. Rather, the trial court simply exercised its discretion to grant a new trial, and so denied J.N.O.V. When viewed from this perspective, it is noteworthy that the Tenth Circuit's opinion omits any reference to the trial court's findings in support of its decision to grant a new trial.

The Tenth Circuit invoked *Jackson* without comprehending (or expressing) the circumstances under which the trial court ordered a new trial. To remedy this deficiency in the record, petitioners have moved the district court for clarification of the record under Fed. R. Civ. P. 60(b)(6). Senior United States District Judge Franklin R. Theis, who presided at both trials below, conducted a hearing on the motion on November 9, 1984. Although Judge Theis has not issued a written opinion at the time

of this writing, his comments at the hearing demonstrate the confusion of the Tenth Circuit concerning the state of the record in the trial court.

> I can frankly say that had I known this what I think is a terrible piece of law at this point, I mean, in that case, they obviously don't know what the trial court's thinking sometimes, why—and that's possibly the trial court's fault, but I would have—I would have no doubt NOV'd it and sent the question upon on an appeal. What they did was take away what I thought was the balance of fairness between the parties.
>
> * * *
>
> [T]he problem is I think they've—they've watered down the authority of the trial judge without knowing why, and—and in fact, I think it's almost like the old practice that when I started in they had trap doors all over the courtroom and if you hit the wrong button, why you were out on the street, and I thought we were through with that type of litigation until I see this—this appeal, and I—I mean, this opinion, and I realize that I have great respect for both Judge McWilliams and [Judge Seymour], but I—I think it's probably apparent from reading the opinion that they didn't understand the intention of the court on this thing . . .

Transcript of Hearing, November 9, 1984.

Judge Theis' concern about the Tenth Circuit's decision is understandable in light of the fact that he had simply followed the plain meaning of Rule 50(b) without being able to foresee that the Tenth Circuit would later adopt a contrary construction of the same language. This case presented an issue of first impression in the Tenth

Circuit[2] and, therefore, the trial court could not have known that the Tenth Circuit would subsequently place an even narrower judicial construction on Rule 50(b) than was done in *Jackson*. The injustice was compounded when the Tenth Circuit refused petitioners' request to remand the case to the trial court so that the state of the evidence might be clarified in order to properly apply the *Jackson* decision.

II. THE DECISION OF THE TENTH CIRCUIT DIRECTLY CONFLICTS WITH THE DECISIONS OF THIS COURT WHICH VALUE SUBSTANTIAL JUSTICE ABOVE INAPPROPRIATE CONSEQUENCES OF NARROW INTERPRETATION OF PROCEDURAL RULES.

The fundamental injustice created by the Tenth Circuit in this case is that petitioners have been left with no relief whatsoever from the erroneous verdict of the first jury. Petitioners reasonably relied upon the trial court and the language of Rule 50(b) as authority for the order granting a new trial upon a motion for J.N.O.V. No precedent existed in the Tenth Circuit that would have alerted either the trial court or petitioners that a

---

2. Included in the decision of the court of appeals below are references to several Tenth Circuit cases: *Kanaster v. Chrysler Corp.*, 199 F.2d 610 (10th Cir. 1952), *cert. denied*, 344 U.S. 921 (1953); *National Farmers Union v. Wood*, 207 F.2d 659 (10th Cir. 1953); *Marshall's U.S. Auto Supply v. Cashman*, 111 F.2d 140 (10th Cir.), *cert. denied*, 311 U.S. 667 (1940). None of these cases, however, addresses the issue concerning the trial court's discretion to grant a new trial upon a motion for J.N.O.V. under Rule 50(b). Rather, these cases discuss the impropriety of a trial court granting a new trial on the court's own initiative, at a time later than 10 days following entry of judgment, and on grounds not contained in the party's motion for new trial. *See* Fed. R. Civ. P. 59(d). In this case, it is uncontroverted that petitioner's grounds contained in its motion for J.N.O.V. included insufficiency of evidence, the same ground noted by the trial court in granting the lesser relief of new trial under Rule 50(b).

new trial could be granted only if the trial court first stated: "J.N.O.V. is warranted." If J.N.O.V. and a new trail had both been denied, petitioners could have sought review in the court of appeals. Conversely, if J.N.O.V. had been granted, respondents would have no doubt appealed, and pursuant to Rule 50(d) would have been allowed to request a new trial as alternative relief in the event of reversal.

If the amendment to Rule 50(b) created by the Tenth Circuit is allowed to stand, there will be no avenue of relief for petitioners to seek review of the highly questionable verdict of the first jury.

This Court has repeatedly held that substantial justice must prevail against strict application of the federal rules. Thus, in cases where parties have relied upon a trial court's interpretation of the timing of post-trial motions under Fed. R. Civ. P. 6 this Court has always recognized an exception to the rule where unique circumstances exist.

For example, in *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962), judgment had been entered in favor of defendant, and within the thirty-day period in which to appeal plaintiff requested an extension of the thirty-day period. The district court granted an extension and plaintiff appealed in the extension period. The Seventh Circuit dismissed the appeal as untimely and not within the "excusable neglect based on failure to learn of the judgment" exception to Rule 73, permitting a thirty-day extension period after the original thirty-day appeal time.

This Court held:

> In view of the obvious great hardship to a party who relies upon the trial judge's finding of "excusable ne-

> glect" prior to the expiration of the thirty-day period and then suffers reversal of the finding, it should be given great deference by the reviewing court. Whatever the proper result as an initial matter on the facts here, the record contains a showing of unique circumstances sufficient that the Court of Appeals ought not to have disturbed the motion judge's ruling. The judgment is vacated and the case is remanded to the Court of Appeals so that petitioner's appeal may be heard on the merits.

371 U.S. at 217.

Harris was followed by *Thompson v. Immigration Service,* 375 U.S. 384 (1964). Petitioner Thompson filed a petition for naturalization which was denied by order of April 18, 1962. Twelve days later on April 30, 1962, petitioner filed notice of post-trial motions to be heard. At the hearing, the trial court stated that the "motion for a new trial" was made in "ample time," and ruled on the merits. The post-trial motions were denied on October 16, 1962, and within sixty days petitioner appealed. The government moved to dismiss the appeal on the grounds that petitioner's post-trial motions were untimely, and therefore, notice of appeal was untimely, being more than sixty days after the original district court order of April 18, 1962. The Court of Appeals granted the Motion to Dismiss.

On appeal to this Court, petitioner admitted his post-trial motions were filed twelve days after entry of judgment. However, petitioner stated that he relied on the government's acquiescence at the time and the trial court's statement that the motions were timely, which caused him to wait until after the post-trial motions were ruled upon to file a notice of appeal.

This Court declared that *Thompson* was squarely within the spirit of *Harris*, and held:

> Here, as there, the petitioner did an act which if properly done, postponed the deadline for the filing of his appeal. Here, as there, the district court concluded that the act had been properly done. Here, as there, the petitioner relied on the statement of the district court and filed the appeal within the assumedly new deadline but beyond the old deadline. And here, as there, the Court of Appeals concluded that the district court had erred and dismissed the appeal. Accordingly, in view of these "unique circumstances," *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., supra*, 371 U.S. at 217, 9 L.Ed.2d at 263, we grant the writ of certiorari, vacate the judgment, and remand the case to the Court of Appeals so that petitioner's appeal may be heard on the merits.

375 U.S. at 387; *see also Wolfsohn v. Hanklin*, 376 U.S. 203 (1964).

This rationale is also found in Kansas law which has largely adopted the federal rules for the procedural rules in state courts.

> The interpretation adopted by the Court of Appeals is unjust and inequitable in that it has the effect of penalizing litigants and their counsel for the mistakes of the court. K.S.A. 60-102 provides that the provisions of the code of civil procedure shall be construed to secure the *just*, speedy, and inexpensive determination of every action or proceeding. Likewise, K.S.A. 60-265 recognizes that the code is to be applied with flexibility to see that justice is done in a particular case. We note the last paragraph in K.S.A. 60-265 which provides as follows:

> "In any matter over which the court has jurisdiction but with reference to which no specific provision is included in this article, the court shall proceed in such a manner as shall be *just and equitable* to protect the rights and interests of all parties affected thereby."
>
> It should also be emphasized that the district courts of this state have broad discretion and powers, independent of the statutory code, to take actions to see that justice is done in a particular case even though there is no specific provision granting such authority in the code of civil procedure.

Daniels v. Chaffee, 230 Kan. 32, 630 P.2d 1090, 1095 (1981) (emphasis added).

These principles are equally applicable in this case. Petitioners relied on Judge Theis' interpretation of Rule 50(b) in granting a new trial. The Tenth Circuit has now declared for the first time that such an interpretation is erroneous. Even if the Tenth Circuit's interpretation could be affirmed, this Court should relieve petitioners from the retroactive effect of such a holding.

CONCLUSION

The holding below is a veritable fount of further confusion, uncertainty, injustice and potential waste of judicial resources. If post-trial discretion of the trial judge is so constrained, what are the consequences of an erroneous determination by the trial court that J.N.O.V. is warranted, but that only a new trial will be ordered: Is the second trial a nullity, even though a timely appeal could not have been taken from the order directing a new trial? Apparently the saving provisions of Rule 50(d) would not apply here since, according to the notes of the

Advisory Committee, its operation is limited to instances in which J.N.O.V. is denied and a second trial has not occurred.

The court below has eviscerated the alternative remedy of new trial built in to Rule 50(b) as lesser relief upon a motion for J.N.O.V. This amounts to more than an interpretation of existing language in the rule; the Tenth Circuit has, in effect, amended the federal rule by judicial fiat. Its decision adds a precondition to the discretion of a trial court to grant a new trial—that the ultimate relief of J.N.O.V. must be "warranted." This new condition directly conflicts with the intention of the drafters of the rules and plain language of the rule itself. If permitted to stand, the absurd result of this holding is that petitioners will have the first judgment reentered against them, without any review, although it was firmly denounced and repudiated by the trial court. To correct this injustice, to forestall its repetition, and to restore the meaning to Rule 50(b) as originally promulgated, the exercise of this Court's supervisory power is essential.

For all the foregoing reasons, a writ of certiorari should be issued to review the decision below of the Tenth Circuit Court of Appeals.

Respectfully submitted,

GERRIT H. WORMHOUDT
(Counsel of Record)
THOMAS D. KITCH
JOHN E. COWLES
Suite 1600, 125 N. Market
P.O. Box 997
Wichita, Kansas 67201
316-267-7361
Attorneys for Petitioners

APPENDIX A

Philip KAIN, d/b/a Brock-Kain Company,
Plaintiff-Appellant,

v.

WINSLOW MANUFACTURING, INC., and Watsco, Inc.,
Defendants-Appellees.

No. 82-1300.

United States Court of Appeals,
Tenth Circuit.

May 31, 1984.

Gerald Sawatzky, Wichita, Kan. (Malcolm Miller and James D. Oliver of Foulston, Siefkin, Powers & Eberhardt, Wichita, Kan., with him on brief), for plaintiff-appellant.

Gerrit H. Wormhoudt, Wichita, Kan. (Thomas D. Kitch and Susan P. Selvidge of Fleeson, Gooing, Coulson & Kitch, Wichita, Kan., with him on brief), for defendants-appellees.

Before McWILLIAMS and SEYMOUR, Circuit Judges, and BROWN,* District Judge.

McWILLIAMS, Circuit Judge.

Philip Kain, doing business as Brock-Kain Company, was a wholesale distributor of bulk liquid hair spray and shampoo, which he sold to beauty salons in Wichita, Kansas. Kain brought suit against Peel's Friendly Supply, Inc., another wholesale distributor of hair spray and related products in Kansas. Joined as a party defendant was Winslow Manufacturing, Inc., described as a subsidiary and

---

*Honorable Wesley E. Brown, United States District Judge for the District of Kansas, sitting by designation.

alter ego of Watsco, Inc. Winslow was a Florida corporation engaged in the manufacture of liquid hair spray and hair spray equipment. The complaint alleged violations of § 1 of the Sherman Act and of the Robinson-Patman Act, together with the business tort of unfair competition. Trial by jury culminated in a verdict in favor of plaintiff Kain against both defendants, i.e., Peel and Winslow. Actual damages were fixed by the jury at $144,744 and punitive damages were awarded in the amount of $250,000. By answers to special interrogatories, the jury found no anti-trust violation on the part of the defendants, but did find that Peel had engaged in unfair competition and that Winslow had knowingly assisted Peel in its efforts.

Judgments were entered on the jury's verdict on October 7, 1980. Thereafter, Peel timely filed a motion for judgment notwithstanding the verdict, and incorporated therein an alternative request for a new trial. Winslow also timely filed a motion for judgment notwithstanding the verdict, but, unlike Peel, did not incorporate a motion for a new trial. And therein lies our present problem.

The trial court held a hearing on defendants' post-trial motions on May 15, 1981. On November 13, 1981, the district court issued a written order denying Peel's motion for judgment notwithstanding the verdict and also denying its request for a new trial, although the court did reduce the punitive damage award against Peel from $250,000 to $100,000. At the same time, the district court specifically denied Winslow's motion for judgment notwithstanding the verdict, commenting in connection therewith that "a judgment notwithstanding the verdict is unwarranted." The district court then proceeded to grant Winslow's motion for a new trial. Winslow, however, had not ever filed such a motion. Finding that the verdict against Winslow was contrary to the weight of the evidence, the court ordered a new trial on the issue of Winslow's liability,

i.e., whether Winslow knowingly assisted Peel's unfair competition with plaintiff.

Retrial of Winslow's liability resulted in a jury verdict in favor of Winslow. Kain then filed a notice of appeal from the judgment entered in favor of Winslow on the second trial of this matter, said notice of appeal specifically noting that Kain, *inter alia,* was appealing the district court's November 13, 1981 order of a new trial. In this connection, Kain argues that, under the circumstances, the district court lacked jurisdiction to order a new trial as to defendant Winslow, and that the judgment entered in favor of Winslow after the second trial should be set aside and the earlier judgment reinstated. We agree.

As indicated, Winslow did not file a motion for new trial as is permitted by Fed.R.Civ.P. 59. Rule 59(d) authorizes a district court to order a new trial on its own initiative for any reason for which it might have granted a new trial on motion of a party, but limits this authority by requiring such action to be taken within ten days after entry of judgment. Here the order of the district court granting Winslow a new trial was filed about thirteen months after entry of judgment. Hence, under Rule 59(d), the district court's action was unauthorized. *Tarlton v. Exxon,* 688 F.2d 973 (5th Cir.1982), *cert. denied sub nom. Diamond M. Drilling Corp. v. Tarlton,* ..... U.S. ....., 103 S.Ct. 3536, 77 L.Ed.2d 1387 (1983); *Peterman v. Chicago, Rock Island & Pacific Railroad Co.,* 493 F.2d 88 (8th Cir. 1974), *cert. denied,* 417 U.S. 947, 94 S.Ct. 3072, 41 L.Ed.2d 667 (1975); *Kanatser v. Chrysler Corp.,* 199 F.2d 610 (10th Cir.1952), *cert. denied,* 344 U.S. 921, 73 S.Ct. 388, 97 L.Ed. 710 (1953). Judge Murrah once explained the policy reasons behind the rule:

> There is good reason for thus confining the trial court within the narrow limits of its discretionary powers,

> for it is important in the administration of justice that there shall be an end to litigation, and that issues tried and decided by a jury shall not be lightly set aside. If a case is to be retried, it should be done with dispatch, lest the error of delay outweigh the error of trial.

Kanatser, 199 F.2d at 615.

Having elected not to file a motion for a new trial under rule 59, Winslow necessarily must rely entirely on Fed.R.Civ.P. 50 as authority for the district court's order granting it a new trial. Such reliance is misplaced, for neither the rule itself nor the authorities considering the rule permit the interpretation argued for here by Winslow.

First, rule 50(b) permits a motion for a new trial to be joined with a motion for judgment notwithstanding the verdict and also provides that a new trial may be prayed for alternatively in the party's motion for a judgment notwithstanding the verdict. Rule 50(b) then states that if a verdict has been returned, the district court has alternative courses of action: 1) it may allow the judgment to stand; or, 2) it may reopen the judgment and either order a new trial or direct the entry of judgment as if the earlier request for a directed verdict had been granted. The language in the second alternative has been interpreted to mean that where a district court concludes that a motion for judgment notwithstanding the verdict should be granted, the court is not required to grant the ultimate in relief; it may order lesser relief in the form of a new trial. *Cone v. West Virginia Paper Co.*, 330 U.S. 212, 216 (1947). At the same time, however, courts have held that where a district court concludes that a motion for judgment notwithstanding the verdict must be, as it was in the instant case, denied, then the district court is without authority under rule 50(b) to order a new trial. *See, e.g., Peterman*

v. Chicago, Rock Island & Pacific Railroad Co., 493 F.2d 88 (8th Cir.1974), *cert. denied*, 417 U.S. 947, 94 S.Ct. 3072, 41 L.Ed.2d 667 (1975); *Jackson v. Wilson Trucking Corp.*, 243 F.2d 212 (D.C.Cir.1957).[1] *See also*, 9 Wright & Miller, *Federal Practice & Procedure* § 2538 (1971), where the following pertinent comment appears:

> It should be noted very carefully that the discretion to order a new trial spoken of in this section exists only if the moving party would be entitled to judgment notwithstanding the verdict. If that motion must be denied, the court has no power to order a new trial in favor of the moving party, except under the conditions specified in Rule 59(d), unless a motion for a new trial has been joined in the alternative with the motion for judgment.

Application of the foregoing principles to the instant case leads us to conclude that the district court was without jurisdiction to order a new trial. Winslow did not file a motion for new trial under rule 59, nor did it join with its motion for judgment notwithstanding the verdict a motion for a new trial, as is permitted by rule 50(b). The district court did not grant a new trial *sua sponte* within the time limitation set forth in rule 59(d), nor did it rule that Winslow's motion for judgment notwithstanding the verdict was well taken and proper. To the contrary,

---

1. We recognize that there is a minority view on this matter. Circuit Judge Burger (now Chief Justice) dissented in *Jackson*, vigorously arguing that a trial court's power to grant a new trial should not be "artificially limited" to cases where judgment notwithstanding the verdict could have been granted. 243 F.2d at 217. Judge Burger urged that where a motion for judgment notwithstanding the verdict is timely made, the trial court should have the discretion to grant a new trial if it finds the evidence is contrary to the verdict. *Id.* at 218. This more flexible approach has also been advocated by several commentators, including Professor Moore. *See* 5A J. Moore, *Moore's Federal Practice*, ¶ 50.11, at 50-99 (2d ed. 1982); 71 Harv.L.Rev. 552 (1958); 33 Notre Dame Law. 126 (1957); 5 UCLA L.Rev. 154 (1957).

the district court concluded that such motion was "unwarranted" and the motion was specifically denied. Under such circumstances, the district court was powerless to order a new trial, and its order exceeded its authority and jurisdiction.

Alternatively, Winslow argues that Kain is somehow estopped from challenging in this court the authority of the district court to order a new trial. We do not agree. We are concerned here with the jurisdiction, or the authority, of a trial court to enter a particular order. Jurisdiction of a trial court can be challenged at any time, *Citizens Concerned for Separation of Church and State v. City and County of Denver,* 628 F.2d 1289, 1297 (10th Cir.1980), *cert. denied,* 452 U.S. 963, 101 S.Ct. 3114, 69 L.Ed.2d 975 (1981), and the parties by their action, or inaction, cannot confer jurisdiction where none exists. *First State Bank and Trust Company v. Sand Springs State Bank,* 528 F.2d 350, 354 (10th Cir.1976). The fact that Kain participated in the second trial of this case does not foreclose it from challenging in this appeal the authority of the district court in the first instance to order a second trial. *See National Farmers Union Auto. & Cas. Co. v. Wood,* 207 F.2d 659 (10th Cir.1953); *Marshall's U.S. Auto Supply v. Cashman,* 111 F.2d 140 (10th Cir.1940).

Judgment reversed and cause remanded with direction that the district court vacate its judgment of March 22, 1982, and then reinstate and reenter its judgment of October 7, 1980, as such relates to Winslow.

WESLEY E. BROWN, District Judge, sitting by designation, dissenting.

I respectfully dissent. I would hold that the trial judge, in the interest of justice, may consider the motion for judgment n.o.v. to encompass the lesser motion for a new trial.

APPENDIX B

(Filed November 13, 1981)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action No. 76-23-C6

PHILIP KAIN d/b/a BROCK-KAIN COMPANY,
Plaintiff,

vs.

WINSLOW MANUFACTURING, INC., WATSCO, INC.,
and PEEL'S FRIENDLY SUPPLY, INC.,
Defendants.

MEMORANDUM AND ORDER RELATIVE TO DEFENDANTS' POST-TRIAL MOTIONS

The captioned case is now before the Court upon the defendants' motions for judgment notwithstanding the verdict, or in the alternative, for a new trial. The jury in this case returned a verdict against plaintiff on his antitrust claim, but found for plaintiff against all defendants on his unfair competition claim. The jury awarded plaintiff $144,744 in actual damages and assessed punitive damages in the amount of $250,000 against all defendants.

Defendant Peel's Friendly Supply, Inc. (Peel's) makes the following arguments in support of its motion: (1) no cause of action based on unfair competition exists in Kansas; (2) There is no evidence that Peel's sold goods below cost to plaintiff's customers; (3) There is no evidence that Peel cut prices with the intent to destroy plaintiff's business; (4) There is no evidence of malice or ill will that

would entitle plaintiff to punitive damages; (5) The evidence of damages is too speculative to support the judgment; (6) The damages award is excessive; (7) Certain testimony should not have been admitted and this testimony caused the verdict to be influenced by passion and prejudice; and (8) Newly discovered evidence exists which should cause a motion for a new trial to be granted. In addition, defendants Winslow Manufacturing, Inc. (Winslow) and Watsco, Inc. (Watsco) argue that Winslow had no knowledge of any unfair competition by Peel's; that there was no proof of any evil motive; that Winslow did not assist in any unfair competition, and that Winslow had no duty to prevent any tortious conduct of Peel's, if such conduct did exist.

The well-established rule is that a motion for judgment notwithstanding the verdict is not to be granted unless all of the evidence points one way and is not susceptible to any reasonable inference which sustains the position of the party against whom the motion is directed. If the evidence and inferences are such that reasonable parties may reach different conclusions, the granting of the motion for judgment notwithstanding the verdict is not permissible. *Burger Train Systems, Inc. v. Ballard*, 552 F.2d 1377 (10th Cir. 1977). As Judge Doyle of the Tenth Circuit has stated:

> "The Court is not to weigh the evidence or pass on the credibility of the witnesses or substitute its judgment for that of the jury. Rather, it must view the evidence most favorably to the party against whom the motion is made and give that party the benefit of all reasonable inferences from the evidence. The philosophy of this doctrine is that there must be a minimum of interference with the jury."

Yazzie v. Sullivant, 561 F.2d 183 (10th Cir. 1977).

The standards for deciding whether to grant a motion for a new trial are somewhat different. It is well-established that the trial judge has broad discretion in deciding whether to grant or refuse a motion for a new trial. *Scholz Homes, Inc. v. Wallace,* 590 F.2d 860 (10th Cir. 1979); *Holmes v. Wack,* 464 F.2d 86 (10th Cir. 1972). The trial judge has the power to see that justice is done and, when justice so requires, he has the authority to set aside the jury's verdict. He may do so when he believes the verdict to be against the weight of the evidence or where he believes the judgment for damages is excessive. *Holmes v. Wack*, supra. As this Court has said many times in previous cases, and as Judge Rogers of this district notes in a recent case, however, the Court should not lightly disturb a jury verdict. *Foster v. American Bankers Insurance Co. of Florida,* No. 77-4141 (D.Kan., Unpub., filed October 3, 1980).

In addition to arguing that the motion for a new trial should be granted because of a lack of evidence in support of the verdict, defendants also argue that the verdict should be set aside on the grounds of excessiveness and newly discovered evidence. A verdict should not be set aside as excessive unless the Court is convinced that it is the result of bias, prejudice or passion. *White Motor Corp. v. Stewart*, 465 F.2d 1085 (10th Cir. 1972). A motion for new trial on the grounds of newly discovered evidence must fail unless the evidence was discovered since the trial, the movant had exercised reasonable diligence, the evidence is material and not merely cumulative or impeaching, and the evidence would probably produce a different result upon retrial. *Marshall's U.S. Auto Supply v. Cashman*, 111 F.2d 140 (10th Cir. 1940); *Foster v. American Bankers Insurance Co. of Florida*, supra.

When considered under the above standards, the motions of Peel's must be denied, but the motion for a new trial by Winslow and Watsco must be granted. The evidence and inferences in this case are such that reasonable persons may reach different conclusions, so a judgment notwithstanding the verdict is unwarranted. The Court will not destroy the verdict by granting defendant Peel's a new trial, as the verdict is not contrary to the clear weight of the evidence. The verdict is contrary to the clear weight of the evidence as to Winslow and Watsco, and for that and other reasons, defendants Winslow and Watsco will be granted a new trial. The Court will examine each of the defendants' arguments.

Defendants continue to claim that no cause of action exists for unfair competition. Defendant Peel's now argues that even if such an action exists at common law, it does not exist in Kansas because the field has been occupied by the Kansas antitrust statutes. This argument must fail. A common law cause of action clearly exists. *Mackey v. Sears Roebuck & Co.*, 237 F.2d 869 (7th Cir. 1956); 1 Callman, *Unfair Competition*, §26, pp. 204-05. While the Court has found no Kansas cases on point, the Court is convinced Kansas would adopt the law of unfair competition in this case. As unfair competition is a distinct cause of action from antitrust, and there is no evidence that the Kansas legislature attempted to foreclose any intentional business torts with its antitrust legislation, defendant Peel's argument that the legislature occupied the field is groundless.

Defendant Peel's argues that there is no evidence of below cost sales or of an ill will to destroy plaintiff's business. These issues rest to a great degree on credibility and of the weight to be given the testimony of any witness. *Boehm v. Fox*, 473 F.2d 445 (10th Cir. 1973). There was a dispute over the type and cost of equipment installed

by Peel's and the jury evidently chose to disbelieve defendants' witnesses on this issue. There was evidence impeaching the credibility of defendants' witnesses on this issue and documentary evidence of invoices that could have been interpreted to show that Peel's was selling below cost and attempting to disguise that fact by falsifying the invoices. While there was a lack of direct evidence of intent by Peel's to drive plaintiff out of business, evil intent may be shown by circumstantial evidence such as a course of conduct. Evil intent is difficult, if not impossible, to prove directly. There was evidence that Peel's sold hair spray systems to plaintiff's customers only, with one alleged exception unsupported by business records. The jury could reasonably infer from the evidence an intent to drive plaintiff out of business. While there was testimony that these customers approached Peel's and not vice versa, the jury was free to judge the credibility of the witnesses.

After reviewing the evidence, the Court does not believe that the jury's findings as to the liability of Peel's are against the weight of the evidence.

Defendant Winslow claims that even if Peel's practiced unfair competition, there was no evidence that Winslow knowingly assisted Peel's in such conduct. The jury's finding of such knowing assistance was, in the Court's view, clearly against the weight of the evidence, assuming there was any competent evidence from which such fact could have been found or inferred.

A great deal of documentary evidence was introduced by plaintiff in an attempt to show that defendants Winslow and Watsco knowingly assisted Peel's in unfair competition against plaintiff. Almost all of the great mass of evidence was completely explained by the defense. The evidence showed that the "special deals" which plaintiff

alleged Peel's received were also available to plaintiff. By the end of the trial, only two receiving records were not completely explained. While the inference might be drawn that these records were altered in an attempt to assist Peel's, this small bit of evidence is simply too slender a thread from which to hang Winslow and Watsco for "knowing assistance." The overwhelming weight of the evidence shows that Winslow and Watsco dealt with Peel's as they dealt with plaintiff—as a non-exclusive franchisee. It was admitted that Winslow could totally revoke plaintiff's franchise for any or no reason. Plaintiff showed no reason why Winslow would engage in some type of complicated scheme to drive plaintiff out of business when it could simply revoke the franchise. The evidence shows that Winslow gave Peel's a franchise in the hopes of increasing business and that Winslow and Watsco did not knowingly assist Peel's in practicing unfair competition against plaintiff.

Plaintiff claims that Winslow and Watsco knew that Peel's intended to drive plaintiff out of business. Even if Winslow and Watsco had knowledge that Peel's may have been preparing to commit a tort, that does not make them guilty of "knowing assistance," unless they actually assisted in the commission of a tort. The evidence clearly shows that Winslow treated Peel's in a manner similar to its treatment of other franchisees. Such treatment cannot be said to constitute "unfair assistance" to the tort of unfair competition.

There is sufficient evidence to support the actual damages assessed by the jury. Plaintiff offered expert testimony based upon the past performance of plaintiff's business. Defendants chose not to cross-examine the witness at any length and failed to offer any expert testimony of their own. While the defendants continuously attempted

to show that changes in hair styles would have destroyed plaintiff's business, there was conflicting evidence on this point and it was within the province of the jury to weigh the evidence. In any event, it is this Court's considered opinion that the verdict was not the result of bias, prejudice or passion, and is not beyond all reason or so great as to shock the conscience of the Court.

Defendants complain about the admission of certain testimony by plaintiff which they claim was inadmissible hearsay. Plaintiff was allowed to testify that he told Mr. Ladove, of Winslow, that plaintiff had heard from a Kain employee that Peel's people told the salon owners that it would be worth a great deal of money to Peel's to have Kain out of business. This hearsay testimony was not offered or admitted for the truth of the matter asserted, but rather to show notice to Winslow of Peel's intentions. This evidence which Kain in his testimony said came to his field representative Huffmeier from an unidentified customer of both Kain and Peel's at an unspecified time, may well have been devastating on the liability of both Peel's and Winslow if the jury did in fact misunderstand or ignore the Court's instruction. Certainly, if taken at face value, it was the only direct evidence of a malevolent intent by Peel's. Although Huffmeier later took the stand as a witness, neither side asked him concerning the fact of whether such hearsay was received by him. Even though the jury was so instructed of the limited purpose of such obvious hearsay, the Court may have erred in admitting this testimony, but there is ample evidence other than this of unfair competition by Peel's. If the admission was error, it certainly does not warrant granting defendant Peel's a new trial.

Finally, defendant Peel's points to newly discovered evidence. The evidence clearly deals with a collateral

matter, is cumulative and is not such that it would produce a different result on retrial.

In conclusion, this Court would again note that the verdict against Peel's in this case rested heavily upon the credibility of witnesses, the weight of circumstantial evidence, and the inferences drawn from the evidence. These are matters wisely entrusted to the jury. While this Court or another jury may have reached a different ultimate conclusion, the verdict against Peel's is not against the clear weight of the evidence and does not do violence to justice. From examination of the record and familiarity with the evidence at trial, the Court finds that the evidence was adequate to sustain the verdict on compensatory damages reached against defendant Peel's.

The verdict against defendants Winslow and Watsco, however, is clearly contrary to the weight of the evidence. The verdict against these two defendants could well have been the result of prejudice against Winslow and Watsco fomented by plaintiff's counsel's repeated allegations of a "cover-up" by Winslow and Watsco and their previous counsel during discovery. Such allegations are highly improper and the Court instructed plaintiff's counsel not to continue making them, and admonished the jury to disregard counsel's statements. Nevertheless, once again counsel referred to this irrelevant and prejudicial topic in his closing argument. Such tactics may well have prejudiced the jury against Winslow and Watsco and is another reason why a new trial as to these defendants must be granted.

There is one other aspect of this case which deserves the attention of this Court. In view of the new trial to be granted to the defendants Winslow and Watsco, the Court feels it incumbent to look at the award of punitive

damages. While the amount of plaintiff's actual damages has been a matter of contention between the parties as to their proof, the merits of which the Court has previously addressed in this opinion, it is axiomatic that compensatory damages are intended to be actual compensation for damages or injuries suffered by a plaintiff. However, the purpose of punitive damages being only to punish an offender or offenders for aberrant conduct, to deter the defendant or defendants and others then unknown from the same or similar misconduct, and to provide such penalty in the public interest as contrasted to the public use, it is apparent the amount allowed in this case is the jury's judgment of the total value of the misconduct by all "guilty" parties. There is now some substantial law that as between multi-tortfeasors the jury should be told to allocate or apportion the fault between the defendants. It is also long existing law that in assessing the amount of punitive damages the jury may consider a wrongdoing defendant's ability to pay, i.e., his net worth financially, and evidence may be introduced on this factual issue. In this case, as the exhibits show, specifically Exhibit 4, there was evidence of substantial assets on the part of defendant Watsco, parent corporation of defendant Winslow, and meager, if any, evidence showing the net worth of defendant Peel's. It seems a safe assumption based on the size of the verdict for punitive damages, that substantial misconduct as well as a substantial part of the punitive damages may have been attributed to defendants Winslow and Watsco, based on the evidence of Watsco's financial affluence. Therefore, the Court believes that fundamental fairness requires the Court to strike down that part of the punitive award which may have been imposed on the defendants Winslow and Watsco under the evidence, and which, standing alone against Peel's, would appear to be

excessive. The amount of punitive damages as to Peel's is reduced from $250,000 to $100,000. Since the amount of actual damages to plaintiff has been determined in the first trial, such judicial action will leave the question of both liability for any damages and the amount of punitive damages attributable against defendants Winslow and Watsco to be determined in the new trial here awarded those two defendants.

IT IS THEREFORE ORDERED that defendant Peel's motions for judgment notwithstanding the verdict and in the alternative for a new trial, and defendants Winslow and Watsco's motion for judgment notwithstanding the verdict, are hereby denied.

IT IS FURTHER ORDERED that defendants Winslow and Watsco's motion for a new trial is hereby granted as to the issues of liability and amount of punitive damages if liability is found to exist.

IT IS FURTHER ORDERED that the amount of punitive damages to be assessed against Peel's is reduced from $250,000 to $100,000.

At Wichita, Kansas, this 12th day of November, 1981.

/s/ Frank G. Theis
United States District Judge

Office-Supreme Court, U.S.
FILED
FEB 1 1985
ALEXANDER L. STEVAS,
CLERK

(2)

No. 84-1117

In the Supreme Court of the United States

OCTOBER TERM, 1984

PHILLIP KAIN d/b/a BROCK KAIN,

Plaintiff-Respondent,

vs.

WINSLOW MANUFACTURING, INC.
and WATSCO, INC.,

Defendants-Petitioners.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

GERALD SAWATZKY
(Counsel of Record)
700 Fourth Financial Center
Wichita, Kansas 67202
Telephone: 316/267-6371
Attorney for Respondent

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

22

QUESTION PRESENTED

Within ten days after entry of judgment on a jury verdict against them, petitioners filed a motion for judgment n.o.v. under Rule 50(b), but did not file an alternative motion for new trial under Rule 59, as permitted by Rule 50(b). More than one year after the judgment, the district court entered an order denying the motion for judgment n.o.v., but granting petitioners a new trial under the mistaken belief that petitioners had alternatively moved for a new trial. On appeal, the original judgment was reinstated on the ground that the district court had no authority to order a new trial on its own initiative after the ten-day period specified by Rule 59(d), and that a motion for judgment n.o.v. under Rule 50(b), properly denied, afforded no authority to grant a new trial.

Thus, the question presented is as follows:

Since Rule 59(d) expressly forbids the district court to grant a new trial on its own initiative more than ten days after judgment, may the district court nevertheless do so after it holds that a motion for judgment n.o.v. under Rule 50(b) must be denied?

TABLE OF CONTENTS

QUESTION PRESENTED 1
OPINIONS BELOW 1
FEDERAL RULES OF CIVIL PROCEDURE INVOLVED IN THIS CASE 1
STATEMENT OF THE CASE 2
ARGUMENT 6
I. The Decision Below Correctly Analyzes and Applies Rules 59(d) and 50(b) in Accord With All Other Federal Courts Which Have Ruled on the Issue 6
II. This Case Exemplifies the Soundness of the Decision by the Court of Appeals in Construing Rule 50(b) in Accord With the Other Federal Courts 11
CONCLUSION 14
APPENDIX A1

TABLE OF AUTHORITIES

Cases

Alderman v. Tandy Corp., 720 F.2d 1234 (11th Cir. 1983) 8, 9
American Bearing Co., Inc. v. Litton Industries, 729 F.2d 943 (3rd Cir. 1984) 9
Cone v. West Virginia Pulp & P. Co., 330 U.S. 212 (1947) 8
Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215 (1962) 14
Jackson v. Wilson Trucking Corp., 243 F.2d 212 (D.C. Cir. 1957) 8, 9
Kanatser v. Chrysler Corp., 199 F.2d 610 (10th Cir. 1952), *cert. denied*, 344 U.S. 921 13
Montgomery Ward & Co. v. Duncan, 311 U.S. 243 (1940) 7, 10
Peterman v. Chicago, Rock Island & Pacific Railroad Co., 493 F.2d 88 (8th Cir. 1974), *cert. denied*, 417 U.S. 947 ..... 8, 9
Slocum v. New York L. Ins. Co., 228 U.S. 364 (1913) 8
Tarlton v. Exxon, 688 F.2d 973 (5th Cir. 1982), *cert. denied*, sub nom. *Diamond M. Drilling Corp. v. Tarlton*, ... U.S. 9
Thompson v. Immigration Service, 375 U.S. 384 (1964) 14

Federal Rules

Fed. R. Civ. P. 50(b) ..... *passim*
Fed. R. Civ. P. 50(c)(1) 9
Fed. R. Civ. P. 50(c)(2) 8
Fed. R. Civ. P. 54(b) 4
Fed. R. Civ. P. 59(d) ..... *passim*

Other Authorities

2B *Federal Practice and Procedure,* Barron and Holtzoff—Wright, Rules Edition 1961, Sec. 1079 10

Moore's Federal Practice, § 50.11 9

9 Wright and Miller, *Federal Practice and Procedure,* Secs. 2538, 2539 10

No. 84-1117

In the Supreme Court of the United States

OCTOBER TERM, 1984

PHILLIP KAIN d/b/a BROCK KAIN,

Plaintiff-Respondent,

VS.

WINSLOW MANUFACTURING, INC.
and WATSCO, INC.,

Defendants-Petitioners.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

OPINIONS BELOW

Attached in the Appendix to this brief is the order of the entire Court of Appeals entered October 4, 1984 denying petitioners' petition for rehearing and suggestion for rehearing *en banc.*

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED IN THIS CASE

Petitioners misquote Rule 50(b) by deleting a portion near the end. The latter portion of this Rule correctly states as follows:

> . . . A motion for a new trial may be joined with this motion, or a new trial may be prayed for

in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

Rule 59(d) provides as follows:

(d) *On Initiative of Court.* Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

STATEMENT OF THE CASE

On October 7, 1980, plaintiff Kain received judgment in his favor on a jury verdict for actual and punitive damages against defendants Winslow Manufacturing, Inc., and its alter ego parent, Watsco, Inc., for knowingly assisting a co-defendant, Peel's Friendly Supply, Inc., in a pattern of unfair competition which put Kain out of the beauty salon supply business in Wichita, Kansas.

Within ten days after judgment, petitioners filed a motion for judgment n.o.v. under Rule 50(b), but declined to join a motion for new trial under Rule 59, as expressly permitted by Rule 50(b). The co-defendant Peel's, on the other hand, did include an alternative motion for new trial within its motion for judgment n.o.v.

Defendants supplied the trial court with only a partial transcript of plaintiff's direct testimony in connection with briefs filed by the parties relating to the post-trial motions. On May 15, 1981, the district court heard oral arguments on the post-trial motions. All the briefs and arguments were devoted solely to the filed motions. In the case of Winslow and Watsco, the only point argued was the sufficiency of the evidence to require denial of the motion for judgment n.o.v., under the legal standards related thereto. There was no suggestion that those defendants sought a new trial; nor was there any suggestion that the trial court was being asked to weigh the evidence under the different and less stringent standards related to motions for a new trial under Rule 59.

On November 13, 1981, over thirteen months after judgment, the district court held in favor of plaintiff Kain on all motions which had been filed, briefed and argued, by denying the two motions for judgment n.o.v filed by both sets of defendants; and by denying the alternative motion for new trial filed by defendant Peel's. It was specifically found, as plaintiff had requested, that "The evidence and inferences in this case are such that reasonable persons may reach different conclusions, so a judgment notwithstanding the verdict is unwarranted." (A. 10.)

Nevertheless, the court proceeded to review and weigh evidence on the issue of petitioners' liability under the different "new trial" standards, which permit a trial judge to exercise discretion in weighing the evidence. (A. 9.) The new trial issue was neither briefed nor argued, and only a partial transcript of plaintiff's direct evidence on the liability issue had been supplied to the court.

Contrary to petitioners' present assertion that the district court construed Rule 50(b) as authorizing a new trial, the district court mistakenly thought that petitioners had

filed a motion for new trial, in addition to the motion for judgment n.o.v. Based on this mistake made some thirteen months after the trial, with only a partial transcript of the critical evidence, and with no briefing or argument on the nonexistent motion, the district court granted petitioners a new trial. After stating that "the motion for a new trial by Winslow and Watsco must be granted" (A. 10), the court specifically ordered that petitioners' motion for judgment n.o.v was denied; but further ordered that "defendants' Winslow and Watsco's motion for a new trial is hereby granted. . ." (A. 16.)

Plaintiff could not appeal the nonfinal new trial order; and his otherwise final judgment against Peel's was also rendered nonfinal, under Rule 54(b). After an abbreviated retrial, and adverse judgment, plaintiff promptly filed its notice of appeal from the November 13, 1981, order granting the new trial, seeking reinstatement of the original judgment. (Respondent's App., *infra.*)

On appeal, plaintiff Kain supplied the court of appeals with complete transcripts of the critical evidence proving Winslow's knowing assistance of Peel's unfair competition, most of which evidence had been overlooked by the district court in weighing the evidence under the standards applicable to new trial motions. The overlooked evidence also demonstrated the correctness of the denial of Winslow's motion for judgment n.o.v.

Plaintiff argued that a new trial order would have been a clear abuse of discretion even had a timely motion for new trial been filed. However, he also argued that the district court had no authority to grant a new trial on its own initiative after the ten day limit imposed by Rule 59(d); and that this requirement could not be bypassed, or evaded, merely because defendants had filed a motion for judgment n.o.v. under Rule 50(b).

Circuit Judge McWilliams, writing for the court of appeals, ruled that the district court had no jurisdiction to grant a new trial on its own initiative more than ten days after judgment, under the specific limits imposed by Rule 59(d). Nor, he ruled, does Rule 50(b), either by its terms or by the consistent interpretation by the federal courts, permit the district court to grant a new trial when the losing party has sought only a judgment n.o.v., and has chosen not to file an alternative motion for new trial. Accordingly, the district court's November 13, 1981, order for new trial, made on its own initiative thirteen months after the judgment, "exceeded its authority and jurisdiction."

Defendants-petitioners filed a petition for rehearing with a suggestion for rehearing *en banc*. Judge McWilliams directed plaintiff to file a response. All active judges on the Tenth Circuit Court of Appeals duly considered the petition for rehearing, and suggestion for rehearing *en banc*. On October 4, 1984, the petition and suggestion were denied. (Respondent's App., *infra*.)

ARGUMENT

Petitioners are mistaken in asserting that there is a conflict among the federal courts on the question presented. They are equally mistaken in contending that the settled rule construing Rules 59 and 50(b), applied below, is "unjust." All federal courts which have spoken on the question have uniformly ruled against the position advocated by petitioners. Moreover, this very case exemplifies the lack of due process, the inordinate delay and procedural confusion engendered by the district court's *sua sponte* decision, more than one year after the date of judgment, to grant petitioners a new trial which was never requested, and was never in issue.

I. The Decision Below Correctly Analyzes and Applies Rules 59(d) and 50(b) in Accord With All Other Federal Courts Which Have Ruled on the Issue.

Since petitioners did not file a motion for new trial, it follows that the district court acted on its own initiative in granting the new trial more than one year after the date of judgment. Rule 59, governing procedure for new trial motions, limits the trial court's authority in granting new trials on its own initiative to the 10-day period following the entry of judgment. Accordingly, the trial court's *sua sponte* grant of a new trial, more than a year after judgment, was in contravention of the specific limits of its authority under Rule 59(d), unless it can be said that a motion for judgment n.o.v. under Rule 50(b) automatically includes within it a motion for new trial.

But Rule 50(b) in specific terms makes clear that a motion for judgment n.o.v., does not of itself include a motion for new trial. Rather, it permits the moving

party to join a motion for new trial, or move for a new trial in the alternative, along with the motion for judgment n.o.v. As recognized by this Court in *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940), each of these motions "has its own office." The motion for judgment cannot be granted unless, as a matter of law, the opponent of the motion failed to make a case. But the motion for new trial "may invoke the discretion of the court insofar as it is bottomed on the claim that the verdict is against the weight of the evidence. . ." (311 U.S. at 251.)

The motion for judgment n.o.v. raises *only* the question whether there is any evidence supporting the verdict and judgment. Once that is answered in the affirmative, the motion must be denied. Therefore, the duty of the opponent of the motion—plaintiff Kain in our case—is only to show enough evidence requiring the motion to be denied. That is what plaintiff demonstrated, and that is what the district court held, in denying the motion.

Since petitioners never moved for a new trial which could invoke the discretion of the trial court in weighing the evidence, plaintiff was under no notice or obligation to summarize all the supporting evidence or to argue its weight. It can thus be seen that when the district court went beyond the motion for judgment n.o.v. to grant a new trial on its own initiative, in a discretionary weighing of evidence more than one year after trial, the action clearly exceeded the limits of authority imposed by Rule 59(d).

Petitioners however, ignore this impediment to their case, and misconstrue other language in Rule 50(b) which permits the court, after determining that the motion for judgment n.o.v. should be ordered, to grant a new trial

to the party who had obtained the judgment, but who would lose the judgment on the motion for judgment n.o.v.

As pointed out in the decision below, under Rule 50(b) the district court may (1) allow the judgment to stand (i.e., deny the motion for judgment); or (2) reopen the judgment and either order a new trial or direct entry of judgment as requested. This discretionary power permits the party who had obtained judgment an opportunity to correct an evidentiary defect in the case. This part of Rule 50(b) reflects the traditional practice in federal and state courts for many years prior to the federal rules. *E.g., Slocum v. New York L. Ins. Co.*, 228 U.S. 364, 380 (1913). Accordingly, it was held in *Cone v. West Virginia Pulp & P. Co.*, 330 U.S. 212 (1947), that the plaintiff, who received judgment on a jury verdict, has the right to present reasons why he should have a new trial, rather than to have judgment entered against him.

The court of appeals thus concluded, citing *Cone*, that where a district court concludes that a motion for judgment notwithstanding the verdict should be granted, the court "is not required to grant the ultimate in relief; it may order lesser relief in the form of a new trial." However, where a district court concludes that the motion for judgment n.o.v. must be denied, then the district court is "without authority under Rule 50(b) to order a new trial." Supporting that conclusion are *Jackson v. Wilson Trucking Corp.*, 243 F.2d 212 (D.C. Cir. 1957); *Peterman v. Chicago, Rock Island & Pacific Railroad Co.*, 493 F.2d 88 (8th Cir. 1974), *cert. denied*, 417 U.S. 947; and *Alderman v. Tandy Corp.*, 720 F.2d 1234, 1236 (11th Cir. 1983).

This construction of Rule 50(b) is confirmed by Rule 50(c)(2), which allows the party whose verdict has been set aside on motion for judgment n.o.v. a period of 10 days to seek a new trial. No such right is given to the party

filing the motion for judgment n.o.v. whether denied or granted. His only right is to file a motion for new trial at the time the original motion for judgment n.o.v. is timely filed within 10 days after the judgment. [See Rule 50(c)(1).]

The court below referred to the dissenting view expressed by then Circuit Judge Burger (now Chief Justice), in the *Jackson* case, and by some commentators. *Alderman v. Tandy Corp.*, supra, also recognized that the rule had been the subject of some early criticism, but pointed out:

> Alderman easily could have joined a motion for a new trial with his motion for judgment n.o.v. He chose not to do so. He cannot complain that some unexpected shift in events has made his decision unpalatable in retrospect. (720 F.2d at 1237.)

Two other cases, while not directly in point, provide support for the same prevailing view adopted by the Eighth, Tenth, Eleventh and District of Columbia Circuits. *Tarlton v. Exxon*, 688 F.2d 973, 978 (5th Cir. 1982), *cert. denied*, sub nom. *Diamond M. Drilling Corp. v. Tarlton*, ... U.S. .....; and *American Bearing Co., Inc. v. Litton Industries*, 729 F.2d 943, 948 (3rd Cir. 1984), cite with approval the *Peterman* and *Jackson* cases.

The early criticism of the *Jackson* case, in urging a so-called "liberal" construction of Rule 50(b), failed to consider the precise language of the Rule, and the purposes of Rules 50(b) and 59. That criticism also rested upon the erroneous assumption that the party opposing a motion for judgment n.o.v. is on "adequate notice of a challenge to the sufficiency of the evidence." *Moore's Federal Practice*, § 50.11, p. 50-99. But the truth is to the contrary. The standards for evaluating motions for judgment n.o.v. and motions for a new trial based on

insufficiency of the evidence, are materially different, as noted in *Montgomery Ward & Co. v. Duncan,* 311 U.S. 243, 251 (1940). Therefore, notice imparted by the n.o.v. motion is not notice that a new trial is in issue under entirely different standards allowing discretion to weigh the evidence.

Professors Wright and Miller make a full analysis of the language of Rule 50(b), in connection with Rule 59, as well as the purposes and reasons surrounding these provisions. (9 Wright and Miller, *Federal Practice and Procedure,* Secs. 2538, 2539.) They point out the different standards applicable to the two motions, and conclude that if the motion for judgment n.o.v. must be denied, "the court has no power to order a new trial in favor of the moving party, except under the conditions specified in Rule 59(d), unless a motion for new trial has been joined in the alternative with the motion for judgment." (Sec. 2538.)[1]

In short, there exists no conflict among the circuits, which have consistently and soundly construed Rule 50(b) as requiring a party moving for judgment n.o.v. to include a motion for a new trial, in order to authorize the district court to grant that party a new trial.[2]

---

1. The earlier edition of this work, 2B *Federal Practice and Procedure,* Barron and Holtzoff—Wright, Rules Edition 1961, Sec. 1079, had repeated Moore's early criticism of the federal court holdings. The re-written, more complete analysis in the present treatise deletes that criticism and fully supports the view taken by the federal courts.

2. Petitioners' attempted reliance on the Advisory Committee's Note (Petition, p. 8), is misplaced. That comment confirms the construction that it is after the court has decided to set aside the verdict, that it may instead grant a new trial.

II. This Case Exemplifies the Soundness of the Decision by the Court of Appeals in Construing Rule 50(b) in Accord With the Other Federal Courts.

This very case vividly demonstrates the lack of due process, the inordinate delay and substantive error which have resulted from the district court's action in awarding a new trial to petitioners many months after the judgment, on its own initiative. The abuse and error sought to be prevented by Rule 59(d), in fixing a ten-day limit for the district court to so act, has here occurred.

After the trial, defendants' counsel had supplied the district court with only a partial trial transcript of plaintiff's direct testimony, omitting critical evidence dealing with Winslow's knowing assistance of Peel's in destroying plaintiff's business. Since Winslow/Watsco filed a motion for judgment n.o.v., and not a motion for new trial, plaintiff proceeded, in briefs and argument, to summarize sufficient evidence requiring the motion to be denied. Plaintiff did not go to the expense of purchasing the additional transcript to make his case complete because it was not needed to defeat the motion for judgment n.o.v. The district court's ruling on petitioners' motion agreed with plaintiff that the evidence and inferences were such that reasonable persons may reach different conclusions, so that "a judgment notwithstanding the verdict is unwarranted."

When, however, the district court proceeded to apply the entirely different standards under a discretionary weighing of the evidence, permissible only under a motion for new trial, it fell into serious factual error. Without an adequate transcript, more than one year after trial, and without briefing or argument thereon, the district court overlooked most of the evidence supporting the jury

verdict and judgment.[3] The district court, as an additional ground for new trial, also ruled that plaintiff's counsel had made inflammatory remarks to the jury, although none of the defendants had raised the point; and the transcript later prepared demonstrated the court's faulty recollection.[4]

For these rulings to have been made with no notice to plaintiff that these questions pertinent to a potential new trial were being considered, is plainly a denial of procedural due process. The only manner in which plaintiff's rights could have been protected was to provide adequate notice that discretionary new trial questions were at issue and were to be determined. Rule 59, as written, provides plaintiff this protection by requiring a motion for new trial to be filed, or by limiting the authority of the district judge to grant a new trial on his own initiative to a ten-day period, when recollections are fresh

---

3. On appeal, complete transcripts were prepared so that the appellate court had available the additional evidence of liability overlooked by the district court. With full knowledge that defendant Peel's was engaging in unfair competition for the express purpose of putting plaintiff out of business, Winslow participated in a predatory below-cost sale to Kain's best customer; gave substantial financial assistance in the form of free merchandise, and a line of credit requiring no payment on the account, or interest, during the 15 months it took to destroy plaintiff's business through predatory methods well known to Winslow. These and related forms of assistance, together with evidence of Winslow's attempted concealment of it, are summarized with numerous rceord citations in pages 14-20 of the Reply Brief of Appellant in the court of appeals.

4. Plaintiff's counsel, at trial, referred to some demonstrably altered records obtained from Winslow through persistent discovery. The district court erroneously concluded that counsel was complaining of a failure of Winslow to comply with discovery requirements (a matter for the court, not the jury), whereas counsel in fact merely explained how and when the altered receiving record documents had sought to conceal Winslow's supply of free merchandise which assisted Peel's efforts to eradicate plaintiff's small business. (R. Vol. 15, pp. 178-93; R. Vol. 16, pp. 257-79; R. Vol. 20, pp. 25-28; R. Vol. 20, pp. 37-39.)

and untarnished by a multitude of other events, and a long lapse of time.

Rule 50(b) also provides plaintiff protection by providing for the filing of a motion for new trial, with a motion for judgment n.o.v., if movant so chooses to seek a new trial.

But the misconstruction of these Rules sought by petitioners would leave open this same potential for denial of due process and invitation for error, as has occurred in this very case. The court of appeals, being fully aware of plaintiff's plight, quoted Judge Murrah's opinion in *Kanatser v. Chrysler Corp.*, 199 F.2d 610 (10th Cir. 1952), *cert. denied,* 344 U.S. 921, summarizing important, judicial policies applicable here:

> "There is good reason for thus confining the trial court within the narrow limits of its discretionary powers, for it is important in the administration of justice that there shall be an end to litigation, and that issues tried and decided by a jury shall not be lightly set aside. If a case is to be retried, it should be done with dispatch, lest the error of delay outweighs the error of trial."

The initial "error of delay" by the district court, which led to the ensuing errors, was its mistaken assumption that petitioners had filed a motion for new trial. By delaying more than a year after the judgment, the district court forgot that no such motion was filed, and failed to review the pleadings which would have corrected the mistake. For petitioners now to pretend (Petition, p. 19) that the district court made an interpretation of Rule 50(b) on which they relied, is contrary to the record, and cannot

obscure the unfortunate errors which occurred due to the long delay.[5]

CONCLUSION

The decision below correctly construes Rule 50(b) and Rule 59, of the Federal Rules of Civil Procedure, consistently with all other federal courts deciding the same issue. That construction is in full accord with the rationale expressed in this Court's decisions construing these same Rules.

Accordingly, the Petition should be denied.

Respectfully submitted,

GERALD SAWATZKY
(Counsel of Record)
700 Fourth Financial Center
Wichita, Kansas 67202
Telephone: 316/267-6371
Attorney for Respondent

---

5. Petitioners' reliance on *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962), and *Thompson v. Immigration Service*, 375 U.S. 384 (1964), is also misplaced. Petitioners were not deprived of any remedies or rights of appeal by the ruling below.

APPENDIX

(Filed March 3, 1982)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

PHILIP KAIN, d/b/a BROCK-KAIN COMPANY, Plaintiff,	)	
vs.	)	Case No. 76-23-C6
WINSLOW MANUFACTURING, INC., WATSCO, INC., & PEEL'S FRIENDLY SUPPLY, INC., Defendants.	)	

NOTICE OF APPEAL

Take notice that plaintiff intends to and does hereby appeal from the order of the district court filed November 13, 1981, setting aside the verdict of the jury, and judgment entered thereon October 7, 1980, adverse to defendants Winslow Manufacturing, Inc. and Watsco, Inc., which order of November 13, 1981, did not become final and appealable until termination of a limited retrial on February 12, 1982.

This appeal is taken from the order of the district court to the United States Court of Appeals for the Tenth Circuit, as by law provided.

Dated: March 3rd, 1982.

FOULSTON, SIEFKIN, POWERS & EBERHARDT
700 Fourth Financial Center
Wichita, Kansas 67202
(316) 267-6371
By /s/ Gerald Sawatzky
Gerald Sawatzky
Attorney for Plaintiff

CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for plaintiff herein, does hereby certify that a true and correct copy of the above and foregoing Notice of Appeal was mailed, postage prepaid, to Mr. Thomas Kitch, Fleeson, Gooing, Coulson & Kitch, 1600 Vickers KSB&T, P.O. Box 997, Wichita, Kansas 67201; and Mr. Gary W. Davis, Martin, Pringle, Fair, Davis & Oliver, 320 Page Court, 220 West Douglas, Wichita, Kansas 67202, on this 3rd day of March, 1982.

/s/ Gerald Sawatzky
Gerald Sawatzky

SEPTEMBER TERM - OCTOBER 4, 1984

Before Honorable William J. Holloway, Jr., Honorable Oliver Seth, Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Circuit Judges and Honorable Wesley E. Brown*

PHILIP KAIN d/b/a BROCK-KAIN CO.,	)	
Plaintiff-Appellant,	)	
v.	)	No. 82-1300
WINSLOW MANUFACTURING, INC., and WATSCO INC.,	)	
Defendants-Appellees.	)	

This matter comes on for consideration of appellees' petition for rehearing, with suggestion for rehearing in banc, and appellant's response thereto, filed in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision. Judge Brown voted to grant rehearing.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

HOWARD K. PHILLIPS, Clerk
By /s/ Robert L. Hoecker
Robert L. Hoecker
Chief Deputy Clerk

---

*United States District Judge for the District of Kansas, sitting by designation.

FILED
FEB 15 1985
ALEXANDER L. STEVAS,
CLERK

(3)

No. 84-1117

In the Supreme Court of the United States

OCTOBER TERM, 1984

WINSLOW MANUFACTURING, INC.
and WATSCO, INC.,
Defendants-Petitioners,

vs.

PHILLIP KAIN, d/b/a BROCK-KAIN,
Plaintiff-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

GERRIT H. WORMHOUDT
(Counsel of Record)
THOMAS D. KITCH
JOHN E. COWLES
Suite 1600, 125 N. Market
P.O. Box 997
Wichita, Kansas 67201
316-267-7361
Attorneys for Petitioners

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

TABLE OF CONTENTS

REPLY BRIEF OF PETITIONERS 1
CONCLUSION 6

TABLE OF AUTHORITIES

Case

Jackson v. Wilson Trucking Corp., 243 F.2d 212 (D.C. Cir. 1957) 1

Rules

Rule 50 5
Rule 50(b) 1, 2, 3, 5
Rule 50(c)(2) 5

No. 84-1117

In the Supreme Court of the United States

OCTOBER TERM, 1984

WINSLOW MANUFACTURING, INC.
and WATSCO, INC.,
Defendants-Petitioners,

vs.

PHILLIP KAIN, d/b/a BROCK-KAIN,
Plaintiff-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

Respondent's brief poignantly demonstrates the need for this Court to either review and reverse the decision below or to amend Rule 50(b).

By his silence, respondent admits, as he must, that the plain, unvarnished language of Rule 50(b) clearly provides that, upon the filing of a motion for J.N.O.V., a trial judge is vested with the discretionary authority to either grant that motion or to order a new trial. However, respondent contends, in effect, that a 1957 decision of the Circuit Court of Appeals for the District of Columbia[1] al-

---

1. *Jackson v. Wilson Trucking Corp.*, 243 F.2d 212 (D.C Cir. 1957).

tered the Rule so that, notwithstanding its literal meaning, it now authorizes a trial court to award the less drastic relief, i.e., a new trial, if and only if, the trial judge first specifically states in the record that J.N.O.V. would have been warranted.

For obvious reasons, respondent does not discuss whether that revision grafted upon Rule 50(b) requires that J.N.O.V. must actually be warranted by the record, or if it is merely sufficient for the trial court to so conclude, however erroneously. The latter position was adopted by the court below while the former seems to be the view of the circuit court that initiated the alteration of Rule 50(b). Nor does respondent discuss the consequences if, after granting a new trial in the latter fashion, it is subsequently determined on appeal that J.N.O.V. was not warranted, even though the trial judge expressly stated otherwise.

More importantly, respondent also ignores the confusion and injustice resulting from the decisional departure from the plain words of Rule 50(b) that are bound to continue so long as the Rule dictates a course of action that leads to a procedural nightmare utterly inconsistent with the stated spirit and purpose of the Federal Rules expressly requiring a construction thereof that secures the just determination of every action.

Respondent's brief reveals that he, the trial judge and these petitioners all assumed that Rule 50(b) means what it says. Surely, respondent believed throughout all of the proceedings in the trial court (including the second trial and the post-trial motions following it) that the district court had the power to grant a new trial upon petitioners' motion for J.N.O.V. Otherwise, counsel for respondent would have been honor bound to challenge the trial court's

authority to do so instead of discovering and raising the issue for the first time on appeal. The trial judge undeniably relied upon the plain language of Rule 50(b), as did petitioners and respondent. But, the litigants and the trial judge all were mistaken in their reliance upon the Rule as written, according to the decision below. In all probability, that mistake will be repeated on every subsequent occasion that a party believes that J.N.O.V. is his most appropriate relief, since there is nothing in the Rule itself to alert him, or his opponent, or the trial court that the lesser relief of a new trial grant is not available if the judge simply concludes that it would be more appropriate than the entry of final judgment.

In remarkable defiance of logic, respondent argues that *he* was prejudiced by the trial court's order granting a new trial. Respondent did not think so at the time. To the contrary, respondent did not challenge the trial court's authority to grant such relief until *after* he lost the second trial.[2] Instead, he elected to take advantage of the new trial to attempt to effectuate a separate recovery from petitioners that could have been much larger than that obtained in the first trial.[3]

Respondent also argues that he was prejudiced because he was not given notice of the possibility that a new trial might be ordered as to petitioners. Nevertheless, respondent briefed and argued the merits of the post-trial mo-

---

2. Respondent admittedly raised this issue for the first time as "an additional question" in his brief in the Court of Appeals.

3. The trial court relieved respondent of the burden of proving actual damages in the second trial, thereby limiting the jury's function to determining whether petitioners had "knowingly assisted" Peel's in acts of unfair competition and, if so, whether punitive damages should be assessed. Of particular advantage to respondent was the opportunity to recover a punitive damage award greater than that assessed by the first jury.

tions, including the grounds for a new trial, without ever hinting that the power to grant a new trial as to all defendants was in any way doubtful. Once such relief was granted as to petitioners, respondent still did not challenge the trial court's authority to grant them a new trial. Only after he lost that trial and began briefing the case on appeal did respondent finally challenge the power of the trial court to order a new trial in lieu of J.N.O.V.

Respondent's argument that he would have tried harder to find evidence of liability in the record if he had known the trial court was going to "weigh the evidence" rings an especially hollow note. This is because the trial court, as is recited in its opinion, could not find *any* evidence to support the jury's verdict on the issue of whether petitioners had "knowingly assisted" Peel's. See p. A12 of the Appendix to Petition. Obviously, the record evidence cited by respondent was not sufficient to withstand a motion for judgment notwithstanding the verdict, but Judge Theis' decision to grant a new trial gave him another opportunity to prove his case against petitioners. He failed to do so a second time.

The fact that Judge Theis may have given a reason for granting the new trial (i.e., that some of the evidence was controverted) which may have been inconsistent with his earlier observations that there was no evidence to support the verdict against petitioners was simply one approach to the issue before him. If he had known that he had to "jump through the *Jackson* hoop"—first find that J.N.O.V. was warranted and then grant a new trial anyway—he would have done so, since all the necessary factual predicates for such a course of action were already present in his written opinion.[4]

---

4. Both Judge Theis' subsequent opinion and the verdict of the second jury demonstrate that petitioners' assessment of the evidence was correct.

Respondent also argues that petitioners have only themselves to blame because they did not request a new trial in the first instance. This argument misses the point entirely. Petitioners did not seek a new trial because there was no evidence to support the verdict against them. When a litigant finds itself in such a position, it obviously has the right to rest on the record and not give its adversary the opportunity to "mend its hole" by offering new or different evidence at a second trial.[5]

Such a tactical decision by a litigant should not mean that a trial court is powerless to grant a new trial if it believes that the ends of justice are better served in such a manner. Indeed, this is what the drafters of Rule 50 believed when they wrote the language in question and is what Rule 50 itself clearly provides.[6]

The injustice from which petitioners seek the protection of this Court is not that they were deprived of a new trial—something they did not need or want—but that they relied upon the plain language of Rule 50 when they acquiesced in the trial court's decision ordering a new trial, thereby depriving them of the opportunity to appeal from the decision overruling their motion for J.N.O.V.[7]

As interpreted by the court below, Rule 50(b) has become a trap for the unwary. As matters now stand,

---

5. The Court of Appeals did not address the issue of whether judgment notwithstanding the verdict would have been "warranted" after the first trial, nor did it remand the case for such a determination.

6. If the trial court does not grant such lesser relief, the verdict winner may itself seek a new trial pursuant to Rule 50(c)(2).

7. The need to file such an appeal became moot when petitioners won the second trial. By the time respondent challenged the trial court's authority to order a new trial, petitioners had lost the opportunity to file a cross-appeal.

litigators and trial courts will continue to rely upon the plain meaning of the Rule whenever relief is sought thereunder. There is nothing within the confines of the Rule itself which will alert those who hereafter apply it to the necessity of consulting case law or treatises to determine what it has been held to require—as opposed to what the language itself clearly states: ". . . the court . . . may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed."

CONCLUSION

For the foregoing reasons, this Court should review and correct the grotesqué miscarriage of justice resulting from the decision below.

Respectfully submitted,

GERRIT H. WORMHOUDT
(Counsel of Record)
THOMAS D. KITCH
JOHN E. COWLES
Suite 1600, 125 N. Market
P.O. Box 997
Wichita, Kansas 67201
316-267-7361
Attorneys for Petitioners